

CARROLL, SS.

SUPERIOR COURT

James W. Bennett, Jr.,
&
Donald J. McWhirter

v.

Town of Brookfield Planning Board

04-E-0037

ORDER

Petitioners James W. Bennett, Jr. and Donald J. McWhirter Appeal a Town of Brookfield Planning Board (the "Board") decision denying that a 16-lot subdivision plat/plan, approved by the Brookfield Planning Board in 1989, had acquired vested rights under RSA 674:39 (Supp. 2004). The Court conducted a hearing on the merits of this Appeal on December 23, 2004. Based on the parties' arguments, the Board's Certified Record, and the applicable law, the Court renders the following determination(s).

By way of background, the subject property at issue is a 54 acre parcel located in Brookfield, New Hampshire, which was subdivided into eighteen lots, by way of an approved plat/plan recorded in 1989. Based on one of the conditions of approval, no lots could be conveyed until the road through the property was completed and approved; accordingly, work was begun in preparation for road construction. In 1990, however, an "economic downturn" rendered the project less economically feasible and the road was not finished. At no point did the Brookfield Planning Board revoke its approval; but a 1992 amendment to the Town Zoning Ordinance regulating lot size based on soil type rendered the subject subdivision non-compliant. Since approval, the

Brookfield tax map has depicted the parcel as subdivided and issued individual tax bills on same.

The Record indicated that the Petitioners acquired the land from the previous owner and went before the Brookfield Board of Selectmen to determine how to proceed with the proposed development. The Board of Selectmen would not formulate a new road construction agreement until Petitioners received confirmation from the Planning Board that the subdivision had "vested." The Board heard evidence on January 12, 2004 but concluded they would contact the town attorney and "walk" the site before a determination. The "walk" was cancelled due to weather and not rescheduled. On February 9, 2004, the Board heard further evidence from Petitioners, but determined that due to insufficient information and lack of receipts from the work done within the year following the original approval of the subdivision, they could not make a determination of "vestment" at that time. The Board held a special meeting on February 23, 2004, where Petitioners presented estimates from the Brookfield and Tuftonboro road agents of the work done on the property, in addition to other evidence. The Board voted on their estimate of the dollar value of the work done on the property within the first twelve months after approval of the subdivision and accepted the figure of \$20,000.00 as the best approximation. The Board then voted that \$20,000.00 was not a substantial amount of funds and consequently the subdivision was not vested.

Petitioner now appeals the Board's decision, averring that the decision was unlawful and not supported by any reasonable evidence. Under RSA 677:15, V (Supp. 2004), the Court may affirm, reverse, or modify a Planning Board decision "when there is an error of law or when the court is persuaded by the balance of probabilities, on the

evidence before it, that said decision is unreasonable." The Court "may not substitute its judgment for that of the board." Cherry v. Town of Hampton Falls, 150 N.H. 720, 724 (2004). "Furthermore, if any of the board's reasons for denial of the [site plan] support its decision, then the [petitioner's] appeal must fail." Id.

Under RSA 674:39:

Every subdivision plat approved by the planning board and properly recorded in the registry of deeds...shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, impact fee ordinances, and zoning ordinances ..for a period of 4 years after the date of approval; provided that:

(a) Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved subdivision plat within 12 months after the date of approval, or in accordance with the terms of the approval.

"The correct standard for 'substantial construction' vesting considers not only construction measured against the entire plan, but also whether the amount of completed construction is per se substantial in amount, value or worth." AWL Power v. City of Rochester, 148 N.H. 603, 608 (2002). The facts and circumstances of each case dictate whether construction is "substantial." Id., at 608.

Petitioners claim that: 1) the Board erred on the law when it concluded that no substantial investment had been made in the subdivision project by inappropriately applying the standard; 2) the Board erred when it did not consider the fact that the Town taxed the subdivision lots individually; 3) the Board erred on the facts when it rejected Petitioners' evidence of the value of the construction completed; and 4) the input of a Board member, based on his personal knowledge, was improper. The Board asserts that the Petitioners ultimately failed to meet their burden of showing that the 1989

subdivision had become "vested" and that the input based on the personal knowledge of one Board member was not improper.

Petitioners assert that the Board applied an improper legal standard under AWL Power because a Board member reviewed the amount expended in conjunction with the overall cost of the project and another wished to consider whether the work completed was substantial for a subdivision of this size by a real estate developer. In AWL Power, the Court stated, "in cases where construction expenditures amount to large sums, construction need not be judged by comparison to the ultimate cost to the project." Id. at 608. The Court also found that "[w]hile it is possible that a developer may vest his rights solely by his construction of public improvements, such vesting will occur because the completed construction was 'substantial,' and not merely because it constituted a certain percentage of the total public improvements." Id. at 607.

In the pending matter, the comments of a few Board members do not alone indicate that an improper standard was applied; nor does the Record indicate that the Board looked solely at the percentage of the work completed. In fact, the Record indicates numerous citations to and discussions of the AWL Power case at the meetings, as well as a consultation with town counsel on the issue. While the AWL Power Court rejected the trial Court's standard which required a developer to complete a certain percentage of the overall project for vesting to take place; its holding did not direct Planning Boards to strictly ignore the size of the project during their deliberations.

Petitioners also claim that the Board erred by not considering the individual assessment and taxation of the subdivision lots in determining whether the subdivision was vested. "[T]he fact that the lots in question have been separately assessed and

taxed accordingly, although not a conclusive factor, does have some bearing on whether the lots may continue to be treated as separate entities." Henry & Murphy, Inc. v. Town of Allenstown, 120 N.H. 910, 913 (1980). Yet, as noted in Henry & Murphy, Inc., and other cases, the fact that the lots are assessed individually is not conclusive on the issue of whether they are separate lots for zoning purposes. See Mudge v. Precinct of Haverhill Corner, 133 N.H. 881, 885 (1991). Accordingly, the taxation of the lots need not have been dispositive and the Board did not err with regard to such consideration.

In order to render a determination of substantial construction, the Board had to make a factual finding as to the amount of work done on the project during the twelve months following subdivision. The Petitioners could not gain access to the receipts from the original developer so the Board was presented with several diverging estimates calculated years after the work was completed, which ranged from \$30,000.00 to \$56,750.00. The Board was not bound to accept any one of them or average them all. The Board's finding that \$20,000.00 was put into the project between 1989 and 1990 was not unreasonable under the circumstances. Furthermore, the problems in determining the actual expenditure on the work completed, due to the insufficiency of the evidence, provides weight to the Board's assertion that it had before it inadequate proof of a substantial investment.

Petitioners argue the Board erred when it allowed the input of a Board member based on his personal knowledge, and same claim that such input renders the instant determination of the Board invalid. Specifically, the Board member in question had visited the site and, during discussions he expressed his incredulity that any excavation

work had been done on the site. The Record indicates that the Board took this position into consideration when calculating its figure for how much money had been spent on the project in the twelve months after subdivision. The statute governing the formation of local land use Boards "manifest[s] a legislative intent to vest in a local board, whose members live close to the circumstances and conditions, authority to determine the public need and the means of meeting it." Vannah v. Town of Bedford, 111 N.H. 105, 108 (1971). "In arriving at a decision, the members of the Board can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved. Id. Petitioners cite Winslow v. Town of Holderness, 125 N.H. 262, 267 (1984), for the principle that Planning Board decisions such as this one are quasi-judicial for the purpose of determining whether due process requirements are met, although Planning Boards "need not provide all the procedural safeguards required in a court of law." The Winslow Court found that action of the Board was voidable where one of its members was disqualified. Id. In Winslow, however, a Board member was disqualified for bias; whereas in this matter, no bias is alleged and the personal knowledge was not improperly considered. Because Petitioners were not able to produce reliable figures based on receipts from the actual work done on the project, an estimation by the Board was compelled. The Court finds that the Board's methods in calculating an estimate, while arguably unusual, were not unreasonable. Ultimately, the Petitioners have not met their burden of showing that the Board's Decision was unreasonable. Therefore, the Court finds the Board's Decision to be lawful and reasonable.

Accordingly, the Court **AFFIRMS** the Town of Brookfield Planning Board's

Decision regarding Petitioner's property; the Petitioners' Appeal is DENIED.

So ORDERED.

2/9/05
DATE

J. DONZ. II
JAMES D. O'NEILL, III
Presiding Justice